80-685

NO. ____

Supreme Court, U.S.
FILED
OCT 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

1980-1981 TERM

THRIF-TEE, INC.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI, TO REVIEW DECISION BY UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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VS.

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PETITION FOR WRIT OF CERTIORARI

I.

QUESTIONS PRESENTED FOR REVIEW.

The question presented for review in this case is whether Section 4611 of the Internal Revenue Code imposes an affirmative obligation on the Commissioner of Internal Revenue to perform certain acts within ninety (90) days of the filing of an Application for a Tentative Carryback Adjustment by a tax payer. Given such an affirmative

obligation, does failure of the Commissioner to act as required pursuant to Section 6411 of the Internal Revenue Code create an estoppel prohibiting the denial of a "claim for refund" under Section 7422(a) due to untimely filing with respect to Section 6511(d) (2) (A) of the Internal Revenue Code? Finally, does the failure to act under Section 6411 of the Code require the Internal Revenue Service to treat the Form 1139 filed thereunder as an "informal claim" for refund, which would be timely filed pursuant to Section 6511 (d) (2) (A) of the Internal Revenue Code of 1954.

II.

ALL PARTIES TO THE PROCEEDING ARE LISTED IN THE CAPTION OF THE CASE.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW..... I
ALL PARTIES TO THE PROCEEDING II
TABLE OF AUTHORITIES III
REFERENCE TO OFFICIAL OPINIONS 1
STATUTES AND REGULATIONS INVOLVED IN CASE 1
STATEMENT OF CASE 2
PETITIONER'S WRIT OF CERTIORARI 4
APPENDIX 5, A-7, B-15, C-17, D-18, E-23, F-30, G-31
CERTIFICATE OF SERVICE 9

IV.

REFERENCE TO OFFICIAL OPINIONS DELIVERED IN THE UNITED STATES DISTRICT COURT AND FOR THE CIRCUIT COURT OF APPEALS.

The United States District Court for the Western District of North Carolina, Asheville Division, the Honorable Woodrow W. Jones presiding, issued an opinion on November 13, 1979 in Civil Case Number A-C-79-132, granting Defendant's Motion to Dismiss for lack of subject matter jurisdiction. This was a memorandum opinion by the Court.

The United States Court of Appeals for the Fourth Circuit affirmed Per Curiam, in an unpublished opinion, judgment being entered on July 17, 1980.

The Petitioner believes that the Court has jurisdiction to review the order entered by the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. 1254(1), providing for review by the United States Supreme Court of judgments entered by the Courts of Appeals in civil cases.

V.

STATUTES AND REGULATIONS INVOLVED IN THIS CASE.

1. **Internal Revenue Code of 1954 (26 U.S.C.):**
   Section 6411, and Regulation 1.6411-3
   Section 6511
   Section 7422
   28 U.S.C. 1346

VI.

STATEMENT OF CASE.

This is an action against the United States demanding the refund of taxes. Jurisdiction is based on 28 U.S.C. 1346 (a) (1) and 26 U.S.C. 7422.

On or about October 1, 1973, Petitioner-taxpayer caused to be mailed to the Internal Revenue Service in Memphis, Tennessee, a Corporate Application for Tentative Refund from Carryback of Net Operating Loss, Net Capital Loss and Unused Investment Credit, on Department of Treasury Form 1139. This is the proper form for such a refund, and is authorized under Section 6411 of the Internal Revenue Code. The form was timely filed, since it was filed within twelve (12) months of the end of the tax year in which Petitioner suffered a net operating loss, said loss being in the amount of approximately Thirty Thousand ($30,000.00) Dollars. Form 1139 contains all information pertinent to any claim for refund to which Petitioner-tax payer was entitled. Under Section 6411 of the Internal Revenue Code, the Commissioner of Internal Revenue Code is required to respond to the filing of a Form 1139 within ninety (90) days after receipt, and is required to refund the money unless there is some mathematical or computational error in the form. Petitioner-tax payer received no response, and finally on May 27, 1977, through its accountants, Petitioner-tax payer inquired of the Internal Revenue Service about a response to its application for a refund. Having had no response to that inquiry, Petitioner-tax payer, again through its accountant, directed an inquiry to the Internal Revenue Service about its claim for refund by letter dated August 26, 1977. On December 30, 1977, the Internal Revenue Service replied to

Petitioner-tax payer, in care of its accountant, that it could not allow the claim, as the claim was "not timely filed". The Internal Revenue Service does not deny that Petitioner-tax payer was entitled to a refund as set forth in its Form 1139, but contends that said amount due cannot be paid because no formal "claim for refund" was filed by Petitioner-tax payer within the time allowed by Section 7422(a). Petitioner has never filed and does not claim to have filed a Form 1120x under this Statute.

The Internal Revenue Service treats the August 26, 1977 letter as a "informal claim", but refused to treat the filing of the Form 1139 (about which the letter simply inquired) as such an "informal claim". The Internal Revenue Service contends that it has no affirmative obligation to act upon receipt of Treasury Form 1139, even though Section 6411 of the Internal Revenue Code specifies action to be taken by the Internal Revenue Service. The Internal Revenue Service contends that its failure to act has no consequences with respect to estoppel or otherwise in the allowance of a tax payer's claim.

Based on the foregoing, after the filing of pleadings, Defendant moved to dismiss Plaintiff's case pursuant to Rule 12b of the Federal Rules of Civil Procedure, on the ground that the Plaintiff has failed to file a timely claim for refund, and therefore, that the Court lacks subject matter jurisdiction. The District Court allowed the dismissal motion, and Plaintiff appealed to The United States Court of Appeals, Fourth Circuit, which affirmed the dismissal by the District Court.

VII.

PETITIONER'S WRIT OF CERTIORARI SHOULD BE GRANTED.

The United States Court of Appeals, Fourth Circuit, has decided an important question of Federal Law which has not been, but should be, settled by this Court. To the best of Petitioner's knowledge, the Court has not decided what consequences, if any, result from the failure of the Commissioner of Internal Revenue to perform his affirmative obligations under Section 6411 of the Internal Revenue Code.

In effect, the decisions herein by the United States District Court and The United States Court of Appeals say that there is no consequence for the tax payer or the Internal Revenue Service for the failure to act as required by Section 6411 of the Internal Revenue Code. On the other hand, the tax payer's failure to file a formal claim for refund results in cursory denial of the refund, despite the fact that the form filed under Section 6411 contains all of the information necessary for the Internal Revenue Service to process the refund. Further, the Internal Revenue Service treats a letter which simply inquires about the status of the Form 1139 as an "informal claim for refund", but denies this status to the Form 1139 which actually contains all of the information.

The Internal Revenue Service does not deny that the tax payer had a justifiable claim for refund, and does not deny that the Commissioner of Internal Revenue has failed to perform his duty under Section 6411 of the Internal Revenue Code. What the lower courts have decided is that these two facts have no consequence or significance for the tax payer, where it failed to file a formal claim for refund on Form

1120X. Petitioner contends that this is grossly unfair, and violative of the statutory scheme set up by Congress in the Internal Revenue Code. Petitioner prays that the Court will grant its Petition of Certiorari, and exercise discretionary review of the case.

VIII.

APPENDIX

Page

A. Memorandum of Decisions by United States District Court, filed November 17, 1979 ..... A1-8
B. Judgment filed November 14, 1979 ..... A9
C. Per Curiam Decision by the United States Court of Appeals, Fourth Circuit, entered July 17, 1980 ..... A10
D. Complaint and Affidavit filed May 22, 1979 ..... A11-19
E. Motion to Dismiss filed June 18, 1979 ..... A20
F. Notice of Appeal filed November 27, 1979 ... A21

Respectfully submitted, this the 10th day of October, 1980.

/s/ John A. Powell

JOHN A. POWELL, Esquire
53 North Market Street
Asheville, N. C. 28801

CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing in the United States Supreme Court, and that within the time specified for filing, I deposited in a United States Post Office or mail box with first class postage pre-paid, and properly addressed to the Clerk of the United States Supreme Court, on the 13th day of October, 1980, an original and forth (40) copies of the Petition for Certiorari hereinbefore set forth.

This the 10th day of October, 1980. The mailing took place in Asheville, North Carolina, at the United States Post Office, on October 13th, 1980, within the permitted time.

/s/ John A. Powell

JOHN A. POWELL, Esquire
53 North Market Street
Asheville, N. C. 28801

STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE
SWORN TO AND SUBSCRIBED BEFORE ME
THIS THE 10th DAY OF OCTOBER, 1980.

/s/ Shirley Gale Kimberling (nee: Hartshorn)

NOTARY PUBLIC
Shirley gale Kimberling (nee: Hartshorn)

My commission expires:
June 13, 1983

APPENDIX A

MEMORANDUM OF DECISION

The Plaintiff, Thrif-Tee, Inc., a North Carolina corporation brings this civil action against the Defendant, United States of America for the refund of an alleged overpayment of its federal income taxes for fiscal year ending April 30, 1971 attributable to a net operating loss carryback from fiscal year ending April 30, 1973. The Plaintiff alleges that these taxes were erroneously and illegally assessed and collected by the Defendant. The action is brought under 26 U.S.C.A. Section 7422 and jurisdiction is alleged under 28 U.S.C.A. Section 1346 (a) (1).

The Defendant moves to dismiss the action pursuant to Rule 12(b), Federal Rules of Civil Procedure on the ground that the Plaintiff has failed to file a timely claim for refund, and that this Court therefore lacks subject matter jurisdiction.

The Court heard arguments of counsel in Asheville on November 1, 1979 and after a full consideration of such arguments, the file and briefs now enters its findings and conclusions.

It is not disputed that the Plaintiff timely filed a U.S. Corporation Income Tax Return (Form 1120) for the fiscal year ending April 30, 1971 and that the tax liability disclosed thereon was $30,052.00. After correcting a computational error, a 1971 fiscal year tax liability of $30,107.09 was assessed and paid.

The Plaintiff alleges that on or about October 1, 1973 an amended U. S. Corporation Income Tax Return (Form 1120X) for the fiscal year ending April 30, 1970 claiming a refund of $3,544.00 for that fiscal year was mailed to the Internal Revenue Service Center in Memphis, Tennessee.

That refund was based upon a net operating loss by the Plaintiff for the fiscal year ending April 30, 1972. The Plaintiff further alleges that on or about October 1, 1973, an Application for Tentative Carryback Adjustment (Form 1139) was mailed to the Internal Revenue Service Center in the same envelope with the above mentioned amended tax return (Form 1120X). This Form 1139 was to carryback a 1973 fiscal year loss to the 1971 fiscal year. The Internal Revenue Service received the amended return (Form 1120X for the 1970 fiscal year, and a refund in the sum of $3,544.00, plus statutory interest, was made on March 11, 1974.

The Internal Revenue Service has no record of receiving the Application for Tentative Carryback Adjustment (Form 1139) from the Plaintiff. Its records do disclose that on June 2, 1977 it received an unexecuted copy of the form along with a letter requesting action on the original Form 1139 allegedly mailed on or about October 1, 1973. The letter received June 2, 1977 was treated as a claim for refund, and a statutory notice of claim disallowance was issued and mailed by certified mail on December 30, 1977. This informal claim was disallowed by the Internal Revenue Service because it was not timely filed.

Section 7422 (a) of the Internal Revenue Code of 1954, uder which the Plaintiff brings this action, provides:

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of

the Secretary or his delegate established in pursuance thereof."

Section 6511 (d) (2) (A) of the Internal Revenue Code of 1954, requires that a claim for refund relating to an overpayment attributable to a net operating loss carryback of a corporation must be filed by the 15th day of the 39th month from the end of the year of the net operating loss. (A recent amendment to this section is not applicable since it only affects carrybacks arising in taxable years after November 10, 1978.) There is no allegation that an agreement was entered into between the Plaintiff and the Internal Revenue Service pursuant to Section 6501 (c) (4).

The Defendant contends that the claim for refund of the 1971 fiscal year taxes was required to have been filed within a period which ends with the expiration of the 15th day of the 39th month following the end of the taxable year of the net operating loss which resulted in the carryback. Section 6511(d) (2) (A). Accordingly, the claim for refund of the 1971 fiscal year taxes resulting from the carryback of the loss from the '1973 fiscal year was required to have been filed on or before July 15, 1976. Since the claim for refund was not received until June 2, 1977 the Defendant contends that it was not timely filed and the action must be dismissed.

The Plaintiff alleges that an Application for Tentative Carryback Adjustment (Form 1139) was submitted to the Internal Revenue Service on or about October 1, 1973 and that the Defendant should be estopped from asserting that the claim for refund was not timely filed because the Internal Revenue Service has failed to act on this application within the required 90 day period after its alleged filing. The Plaintiff further contends that Section 6411(b) provides that the Secretary shall act upon such application within 90 days and that he failed to do so and that since the language of the

Section is mandatory he is estopped or has waived the right to a defense based upon a statute of limitations.

The question as to whether the Plaintiff timely mailed the Application for Tentative Carryback Adjustment (Form 1139) and whether it was received by the Secretary are factual issues which are in dispute. Therefore the matter is not ripe for summary judgment or a motion to dismiss. However, the Defendant contends that assuming arguendo for the purpose of this motion that the Application for Tentative Carryback Adjustment (Form 1139) was timely filed the motion to dismiss must be allowed, because the application did not constitute a claim for a refund.

The Defendant contends that Section 6411(a) specifically provides that such application does not constitute a claim for credit or refund. Treasury Regulation §1.6411-1(b) (2) expands upon this provision as follows:

> (2) An application for a tentative carryback adjustment does not constitute a claim for credit or refund. If such application is disallowed by the district director or director of a service center in whole or in part, no suit may be maintained in any court for the recovery of any tax based on such application. The filing of an application for a tentative carryback adjustment will not constitute the filing of a claim for credit or refund within the meaning of section 6511 for purposes of determining whether a claim for credit or refund was filed prior to the expiration of the applicable period of limitation. The taxpayer, however, may file a claim for credit or refund under section 6402 at any time prior to the expiration of the applicable period of limitation, and may maintain a suit based on such claim if it is disallowed or if the district director or director of a service center does not act on the claim within 6 months from the date it is filed. Such claim may be filed before, simultaneously with, or after the filing of the application for a tentative carryback adjustment. A claim for credit

or refund under section 6402 filed after the filling of an application for a tentative carryback adjustment is not to be considered an amendment of such application. Such claim, however, in proper cases may constitute an amendment to a prior claim filed under section 6402.

The Plaintiff admits that no claim for refund as such was filed but contends that all the necessary information for such refund is contained in its application for Tentative Carryback Adjustment and the only departure from the perfect procedure was merely of form and not of substance. It is contended that the Commissioner was in no way misled and that he has all the information before him necessary for a favorable decision to refund the taxes. The case of *Hoyt v. United States,* 21 F. Supp. 353, 86 Ct. Cls. 19 is cited and relied upon by the Plaintiff for support of this position.

The Supreme Court in *Angelus Milling Co. v. Commissioner of Internal Revenue,* 325 U.S. 293, 65 S.Ct. 1162, 89 L.Ed. 1619 (1945) seemed to answer this argument when Justice Frankfurter speaking for the Court said:

> "Petitioner's claim for recovering processing taxes paid by it was properly rejected by the Commissioner if it did not satisfy the conditions which Congress directly and through the rulemaking power given to the Treasury laid down as a prerequisite for such refund. Insofar as Congress has made explicit statutory requirements, they must be observed and are beyond the dispensing power of Treasury officials. (citations omitted). Without needless elaboration, we conclude that there is nothing in what Congress has explicitly commanded to bar the claim. The effective administration of these modern complicated revenue measures inescapably leads Congress to authorize detailed administrative regulations by the Commissioner of Internal Revenue. He may insist upon full compliance with his regulation."

The Milling Company contended that the claims filed by Niagara Falls Milling Company, which was owned by the same stockholders, and the petitioner contained all the data required by the regulations. Justice Frankfurter disposed of this contention by holding:

> "But it is not enough that somewhere under the Commissioner's roof is the information which might enable him to pass on a claim for refund. The protection of the revenue authorizes the Commissioner to demand information in a particular form, and he is entitled to insist that the form be observed so as to advise him expeditiously and accurately of the true nature of the claim."

Congress, by the enactment of Section 7422 (a) explicitly provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary according to the provisions of law and the regulations.

Section 6411 provides for the filing of Tentative Carryback Adjustments and Section 6511 places time limitations on claims for refunds or credits.

Then Regulation §1.6411-1(b) (2) specifically provides that an application for a tentative carryback adjustment does not constitute a claim for credit or refund.

In *Crismon v. United States,* 550 F.2d 1205 (9th Cir. 1977) the Court held:

> "The Internal Revenue Code (26 U.S.C. §6411 (a), the Treasury Regulations (§1.6411-1 (b) (2), and Form 1045 itself all state specifically that Form 1045, Application for Tentative Carryback Adjustment, is not a claim for a credit or refund. *See Rock v. United States,* 279 F.Supp. 96 (S.D. N.Y. 1968). We therefore find that filing of the 1045 Form was not a proper claim for a

refund, and that the proper form filed by the Crismons was untimely.

"Under 26 U.S.C. §7422 (a), the Crismons are prevented from maintaining a suit in any court for a tax refund until a claim for a refund has been 'duly filed.' An untimely refund claim is not 'duly filed.' Therefore, the district court properly dismissed the suit for lack of jurisdiction.

"The Crismons' contention that the IRS has waived the statute of limitations or is estopped to assert that defense is without merit."

The Congress answered this argument by providing in Section 6411 that, "an application under this subsection shall not constitute a claim for credit or refund."

Perhaps the strongest contention advanced by the Plaintiff is its claim that assuming arguendo that the application for Tentative Carryback Adjustment was timely filed then the Commissioner is estopped to raise the untimeliness of the claim for refund because he failed to act upon the application within 90 days as required by Section 6411. It is true the statute provides that within 90 days from the date the application is filed the Secretary shall act upon the same but such action is tentative and the statute provides no sanction for his failure to act. In the case of *Yarnow v. C.I.R.*, 48 T.C. 213 (1967) the tax court held that the Commissioner's failure to act within 90 days on petitioner's application under this section for tentative carryback adjustment of 1960 net operating loss did not bar his later determining deficiency for 1960, which was timely filed within consent period, since this section denominated such action as tentative and provided no sanction for failure to act.

It was not necessary for the Plaintiff to await action by the Secretary on its application for tentative carryback adjustment to file its claim for refund. Such claim could have been

filed at any time without regard to action or lack of action on the carryback application.

On the basis of the statute, regulations, and the cases cited and relied upon by the Defendant the Court concludes that the Plaintiff's claim for refund was not timely filed and the action must therefore be dismissed for lack of jurisdiction.

An order dismissing the action with prejudice will be entered simultaneously herewith. The Clerk shall send copies of this Memorandum to the attorneys for the parties.

This the 13th day of November, 1979.

/s/ Illegible

Chief Judge

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-79-132

THRIF-TEE, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	JUDGMENT
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

THIS MATTER was heard by the Court and upon the basis of the findings and conclusions set forth in a Memorandum of Decision filed simultaneously herewith, the action must be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's action be and the same is hereby dismissed with prejudice.

This the 13th day of November, 1979.

/s/ Illegible

Chief Judge

PER CURIAM:

Plaintiff, Thrif-Tee, Inc., a North Carolina corporation, brought this action on May 22, 1979, under 26 U.S.C. §7422 against the United States of America for the refund of an alleged overpayment of its federal income taxes for the fiscal year ending April 30, 1971, attributable to a net operating loss carryback from the fiscal year ending April 30, 1973. 26 U.S.C. §7422(a) provides that "no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for refund or credit has been duly filed with the Secretary . . . according to the provisions of law . . . and the regulations . . ." The district court found that the taxpayer failed to timely file a claim for a refund and sustained a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. We agree that the alleged failure of the Commissioner to act within ninety days on appellant's Application for Tentative Carryback Adjustment does not constitute an estoppel which would permit this action. We affirm for the reasons stated in the district court's opinion. *Thrif-tee, Inc. v. United States,* ____ F. Supp. ____, No. A-C-79-132 (W.D.N.C. November 13, 1979).

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1801

THRIF-TEE, INC.,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, Chief Judge.

Argued: June 5, 1980 Decided: July 17, 1980

Before WINTER and SPROUSE, Circuit Judges and WALTER E. HOFFMAN, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Philip G. Carson (Adams, Hendon & Carson, P.A.; Robert J. Deutsch on brief) for Appellant; Kristina Harrigan, Tax Division, Dept. of Justice (Harold M. Edwards, United States Attorney; M. Carr Ferguson, Assistant Attorney General; Gilbert E. Andrews and Grant W. Wiprud, Tax Division, Dept. of Justice on brief) for Appellee.

APPENDIX D

1d

UNITED STATES DISTRICT COURT
Western District of North Carolina
Asheville Division

THRIF-TEE, INC., Plaintiff	)	
	)	Civil Action No.
vs.	)	A-C-79-132
	)	COMPLAINT AND
THE UNITED STATES OF AMERICA	)	AFFIDAVIT

1. Plaintiff, Thrif-Tee, Inc., is a corporation organized and existing under the laws of the State of North Carolina with a place of business in Hendersonville, North Carolina.

2. The Defendant is the United States of America.

3. Plaintiff brings this action against the United States of America for the recovery of income taxes illegally and erroneously assessed and collected from Plaintiff. Plaintiff is a citizen of the United States, and jurisdiction is conferred upon this court by 28 USC §1346 (a) (1) and 26 USC §7422.

4. Plaintiff timely filed U. S. Corporation Income Tax Return Form 1120 for the year ending April 30, 1970 which return disclosed income tax liability of $5,225.00 said tax having been duly paid.

5. Plaintiff timely filed U. S. Corporation Income Tax Return Form 1120 for the year ending April 30, 1971 which return disclosed income tax liability of $30,052.00 said tax having been duly paid.

6. Plaintiff timely filed U. S. Corporation Income Tax

Return Form 1120 for the year ending April 30, 1972 which return disclosed a net operating loss of $21,228.00.

7. Plaintiff timely filed U. S. Corporate Income Tax Return Form 1120 for the year ending April 30, 1973 which return disclosed a net operating loss of $109,802.00.

8. On or about October 1, 1973, Plaintiff mailed to the Internal Revenue Service Center in Memphis, Tennessee, Amended U. S. Corporation Income Tax Return Form 1120X for the year ending April 30, 1970 claiming a refund of $3,544.00 for the fiscal year ending April 30, 1970, said refund being based upon an increase in deductions due to the carryback of net operating loss of Plaintiff and subsidiaries for the fiscal year ending April 30, 1972. The refund claimed was made and received by Plaintiff on March 25, 1974.

9. On or about October 1, 1973 and in the same post paid envelope in which the Form 1120X referred to in paragraph 8 was mailed, Plaintiff mailed to the Internal Revenue Service Center in Memphis, Tennessee, Corporation Application for Tentative Refund from Carryback of Net Operating Loss, Net Capital Loss and Unused Investment Credit Form 1139 which disclosed a refund due Plaintiff in the amount of $30,052.00 from the tax year ending April 30, 1971 by reason of the carryback of the net operating loss of the year ending 1973. A copy of said Form 1139 as filed (except original was duly executed) is attached hereto as Exhibit A.

10. Pursuant to Internal Revenue Code (Code) §6411, the filing of Form 1139 within twelve months of the end of the tax year ending April 30, 1973 in which year Plaintiff suffered a net operating loss was a timely and proper manner for applying for a refund for taxes paid in the tax year ending April 30, 1971.

1. Code §6411 requires the Secretary to act upon an

application for tentative refund filed on Form 1139 within 90 days from the date on which such application is filed under subsection (a) of §6411 or from the last day of the month in which falls the last date prescribed by law for filing the return for the taxable year of the net operating loss results, whichever is later. In the instant case the 90 day provision applied.

12. The Secretary did not respond to the Plaintiff in any manner during the period of time mandated by Code §6411(b).

13. Plaintiff by and through its accountants thereafter filed what is referred to by the Service as a claim dated May 27, 1977 and received by the Internal Revenue Service Center, Memphis, Tennessee on June 2, 1977 for the refund previously claimed on Form 1139. A copy of said "claim" is attached hereto as Exhibit B.

14. No reply or acknowledgement was received by Plaintiff to its claim of May 27, 1977 and Plaintiff's accountants, therefore, again inquired of the Service by letter dated August 26, 1977. A copy of said letter is attached as Exhibit C.

15. The Internal Revenue Service (Service) denied Plaintiff's "claim" by letter dated December 30, 1977 which letter was the first response received by Plaintiff from the Service which mentioned Plaintiff's Form 1139. A copy of the Service's letter is attached hereto as Exhibit D.

16. The requirements of Code §6411(b) that the Secretary act within 90 days of filing are mandatory and the failure of the Secretary to act within such period and the further failure of the Secretary to act within the period in which Plaintiff might have timely filed a conventional claim for refund have greatly prejudiced Plaintiff.

17. The Defendant should be estopped from asserting

any defenses based upon a lapse of time for the reason for that the Secretary failed to act within the time allowed by law as the Plaintiff had cause to believe he would.

18. The Plaintiff's time for filing a claim for refund should be extended until such time as the Secretary responded or responds as required by Code §6411(G).

19. The failure of the Secretary to refund taxes in the amount of $30,052.00 was erroneous and illegal.

20. Plaintiff has overpaid its liability for income taxes for the tax year ending April 30, 1971 and is entitled to recover from Defendant the sum of $30,052.00 plus interest from April 30, 1973. No part of said amount or total amount has been r epaid to Plaintiff.
been repaid to Plaintiff.

21. Plaintiff is the sole owner of the aforesaid claim for refund against Defendant and has made no assignment of said claim.

WHEREFORE, Plaintiff demands a jury trial and prays for judgment against the Defendant in the total amount of

$30,052.00 and such further relief to which Plaintiff may be entitled together with costs and interest as provided by law.

ADAMS, HENDON & CARSON, P.A.

By: Illegible

Attorney for Plaintiff
Suite 601, First Union Bank Bldg.
Asheville, N. C. 28801
(704) 252-7381

/s/ Robert J. Deutsch

ROBERT J. DEUTSCH
Attorney for Plaintiff
124 South Main Street
Hendersonville, N. C. 28739
(704) 692-4286

APPENDIX E

1e

STATE OF NORTH CAROLINA
COUNTY OF HENDERSON

CHARLES GIDNEY, President of Thrif-Tee, Inc., being first duly sworn deposes and says: That he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters and things therein stated upon information and belief and as to those matters and things he believes it to be true.

THRIF-TEE, INC.

By: /s/ Charles W. Gidney

Charles Gidney, President

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 17th DAY OF MAY, 1979.

/s/ Shirley Gale Kimberly (Nee: Hartshorn)

NOTARY PUBLIC

My commission expires:
June 13, 1983

EXHIBIT A

Form **1139** (Rev. Dec. 1970) Department of the Treasury Internal Revenue Service

Corporation Application for Tentative Refund from carryback of Net Operating Loss, Net Capital Loss and Unused Investment Credit

File this Application Separately from Your Income Tax Return to Insure Prompt Action

Name: THRIP-TEE INC & SUBSIDIARIES | Employer Identification Number: 56-0945678

Number and street: P.O. Box 184

City or town, State, and ZIP code: Grover N.C. 28073

1. Enter the taxable year and amount of net operating loss, net capital loss and unused investment credit carryback.
   Year ended 4/30/73
   Net operating loss $ 109,802
   Net capital loss $
   Unused investment credit $

2. Date the return was filed for year of net operating loss, net capital loss and unused investment credit ▶ 7/16/73
   Office where filed ▶ Memphis, Tenn.

3. Was a consolidated return filed for the year specified in Item 1?
   Yes ☑ No ☐ If "Yes," enter the employer identification number shown on such return if different than above ▶

4. (a) Preceding taxable year asked (years allowed by carryback)	(b) Office where return filed	(c) Amount of any unused income limit (Extension automatic for which an extension of time for payment under section 6164 is in effect)	(d) Amount of any other unpaid loss (penalty)	(e) Unpaid tax for which extension for payment under section 6164 is in effect	(f) Was a consolidated return filed? Yes	(f) No
3d N/A	N/A	None				
2d 4/30/71	Chamblee Ga.	T			✓	
1st 4/30/72	Memphis Tenn	T			✓	

5. If Form 1138 (Extension of Time for Payment of Taxes by Corporation Expecting a Net Operating Loss Carryback) has been filed, was an extension of time granted for filing the return for the year of the net operating loss? Yes ☐ No ☐
   If "Yes," give date to which extension was granted ▶ Give date Form 1138 was filed ▶

6. If you changed your accounting period, give date permission to change was granted

7. Date of incorporation

8. If this is an application of a dissolved corporation, give date of dissolution

9. Have you filed a petition in Tax Court for the year or years to which the loss is to be applied? Yes ☐ No ☐

Computation of Decrease in Tax	3d preceding tax year ended N/A (a) Liability as last determined	3d preceding tax year ended N/A (b) Liability after carryback	2d preceding tax year ended 4/30/71 (a) Liability as last determined	2d preceding tax year ended 4/30/71 (b) Liability after carryback	1st preceding tax year ended 4/30/72 (a) Liability as last determined	1st preceding tax year ended 4/30/72 (b) Liability after carryback
1. Taxable income before deducting loss 2 and 4			75,632	75,632	40553	
2. Capital loss carryback (see instruction E for limitation)						
3. Line 1 less line 2			75,632	75,632		
4. Net operating loss deduction resulting from carryback				75,632		
5. Line 3 less line 4			75,632	-0-		
6. Tax on line 5 (see instr. C)			30,052	-0-		
7. Alternative tax (see instr. C)						
8. Income tax (line 6 or line 7, whichever is lesser)			30,052	-0-		
9. Foreign tax credit						
10. Line 8 less line 9			30,052	-0-		
11. Investment credit (see instr. F)						
12. Line 10 less line 11			30,052	-0-		
13. Personal holding company tax (Schedule 1120 PH)						
14. Tax from recomputing prior year investment credit						
15. Minimum tax						
16. Total of lines 12, 13, 14, and 15			30,052	-0-		
17. Enter amounts from line 16, columns (b), (d), and (f)			-0-			
18. Decrease in tax (line 16 less line 17)			30,052			

Under penalties of perjury, I declare that I have examined this application, including any accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

CORPORATE SEAL

Date | Signature of officer | Title

EXHIBIT B

Internal Revenue Service
3131 Democrat Road
Memphis, Tennessee 38110

Re: Thrif - Tee, Inc. and Subsidiaries
P.O. Box 188
Clyde, North Carolina 28721

56-0945675

Gentlemen:

The above referenced taxpayer has requested that we inquire into the fact that no action has been taken on a "Corporate application for tentative refund from carryback of net operating loss" reflecting a refund in the amount of $30,052, for the fiscal year ending 30 April 1973. Form 1139 was filed on 24 September 1973.

The carryback was to fiscal year end 30 April 1971.

At the same time the form 1139 was mailed to Internal Revenue, an 1120X for fiscal year end 30 April 1970 was submitted indicating a refund of $3,544. The $3,544 refund was received.

We are enclosing copies of both the form 1139 and form 1120X.

Your kind attention advising the appropriate steps to be taken on the form 1139 will be appreciated.

Very truly yours,

James M. E. Helgreen

Enclosures - Form 1120X
Form 1139
Form 2848

27 May 1977

EXHIBIT C

HELGREEN & HELGREEN
ACCOUNTANTS

POST OFFICE BOX 1111
BLACK MOUNTAIN, NORTH CAROLINA 28711
PHONE (704) 669-8784

JAMES N. E. HELGREEN
ENROLLED TO PRACTICE BEFORE
THE U. S. INTERNAL REVENUE SERVICE

POST OFFICE BOX 1111
HENDERSONVILLE, NORTH CAROLINA 28739
PHONE (704) 693-5907

Internal Revenue Service
3131 Democrat Rd.
Memphis, TN 38110

RE: Thrif-Tee, Inc. & Subsidiaries
P.O. Box 188
Clyde, N.C. 28721

ID: 56-0945675

Gentlemen:

We are enclosing copies of our correspondence dated May 27, 1977 for the above reference taxpayer. As of today we have not received any reply from your office on this matter. We would appreciate you rechecking your records and advising us of the appropriate steps to be taken.

Very truly yours,

James N. E. Helgreen
August 26, 1977

EXHIBIT D

Internal Revenue Service **Department of the Treasury**

3131 DEMOCRAT ROAD
MEMPHIS, TN 38110

DEC. 30, 1977 LTR 1250 19670130 9211

THRIF-TEE INC.
% JAMES N. E. HELGREEN
P. O. BOX 1111
Hendersonville, NC 28739

CERTIFIED MAIL

Employer Identification Number: 56-0945675
Form Number: 1120X
Tax Period Ended: Apr. 30, 1973

Dear Sirs:

We are sorry, but we cannot allow your claim, which we received June 2, 1977. This is your legal notice that your claim is disallowed.

The law provides that the earliest date acceptable for a claim to be considered timely filed is the postmark date stamped on the cover in which the claim was mailed. The postmark date on the envelope containing your forms identified in the heading of this letter indicated that your claims were not timely filed.

We have no record of receiving a timely Form 1139 for fiscal year ending April 30, 1973.

If you wish to bring suit or proceedings for the recovery of

any tax, penalties, or other moneys for which this disallowance notice is issued, you may do so by filing such a suit with the United States District Court having jurisdiction, or the United States Court of Claims. The law permits you to do this within 2 years from the mailing date of this letter.

We hope this information will be helpful. If you have any questions and wish to call us at 901-365-5200, Mrs. Barber will be able to help you. Since there will be a long-distance charge to you if you are beyond the immediate dialing area of the service center, you may prefer to write us at the address on this letter or call any Internal Revenue Service office.

Sincerely yours,

/s/ Claude A. Kyle
Director, Serice Center

APPENDIX F

1f

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA ASHEVILLE DIVISION

THRIF-TEE, INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL NO.
	)	A-C-79-132
UNITED STATES OF AMERICA,	)	
	)	
Defendant	)	

MOTION TO DISMISS

The defendant, United States of America, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, moves the Court to dismiss this action on the ground that plaintiff has failed to file a timely claim for refund. Therefore, this Court lacks jurisdiction over the subject matter of the action.

A memorandum in support of this Motion is attached hereto.

HAROLD M. EDWARDS
United States Attorney

By: /s/ Illegible

Assistant United States Attorney

APPENDIX G

1g

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A-C-79-132

THRIF-TEE, INC., Plaintiff	)	
v.	)	NOTICE OF APPEAL
UNITED STATES OF AMERICA, Defendant	)	

Notice is hereby given that Thrif-Tee, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the judgment of the United States District Court dismissing the plaintiff's action pursuant to Rule 12(b) of the Federal Rules of Civil Procedure entered in this action on the 14th day of November, 1979.

November 26, 1979.

ADAMS, HENDON & CARSON, P.A.

By /s/ Illegible

Attorneys for Plaintiff
P.O. Box 7246
Asheville, North Carolina 28807
704/252-7381

No. 80-685

In the Supreme Court of the United States

OCTOBER TERM, 1980

THRIF-TEE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Bull v. *United States*, 295 U.S. 247 4

Crismon v. *United States*, 550 F. 2d 1205, cert. denied, 434 U.S. 807 3

Morse v. *United States*, 46 A.F.T.R. 2d para. 80-5030 (Ct. Cl. June 6, 1980) 3

Schrader v. *IRS*, 35 A.F.T.R. 2d 686 3

United States v. *Garbutt Oil Co.*, 302 U.S. 528 4

Zarnow v. *Commissioner*, 48 T.C. 213 4

Statute and regulation:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 6411 ..... 3, 4

Section 6411(a) 3, 4

Section 6511 ..... 3, 4

Section 6511(d)(2) 2, 3, 4

Section 7422 ..... 2, 4

Treasury Regulations on Income Tax (26 C.F.R.):

Section 1.6411-1(b)(2) 3

Section 1.6411-2(b) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-685

THRIF-TEE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether the courts below properly dismissed petitioner's refund suit because it failed to file a claim for refund within the statutory period.

The pertinent facts may be summarized as follows: On or about October 1, 1973, petitioner alleges that it filed an Application for Tentative Carryback Adjustment (Form 1139) reflecting a net operating loss carryback from the taxable year ended April 30, 1973, to the year ended April 30, 1971. On June 2, 1977, the Internal Revenue Service received a letter from petitioner's accountant requesting action on the Application for Tentative Carryback Adjustment (Form 1139). This was the first inquiry from petitioner regarding the Form 1139 allegedly mailed 44 months earlier. The Internal Revenue Service treated this letter as an informal claim for refund, denied it as untimely filed, and

issued a statutory notice of disallowance which was mailed to petitioner by certified mail on December 30, 1977. Petitioner thereupon brought this suit for a refund in the United States District Court for the Western District of North Carolina. The district court dismissed the suit for lack of subject matter jurisdiction. In its view, even on the assumption that petitioner mailed a Form 1139 on October 1, 1973, such an application for a tentative carryback adjustment could not be treated as a claim for refund that would have given the court jurisdiction to hear the case. The court of appeals affirmed (Pet. App. 2b).

1. The decision below correctly dismissed petitioner's refund suit. Section 7422 of the Internal Revenue Code of 1954 (26 U.S.C.) prohibits suits for the recovery of income taxes unless the taxpayer has duly filed a timely claim for refund or credit with the Secretary of Treasury or his delegate. Section 6511(d)(2) of the Code requires a corporate taxpayer claiming a credit or refund attributable to a net operating loss carryback to file its claim for refund or credit on or before the 15th day of the 39th month following the end of the taxable year of the net operating loss.

Here, petitioner's net operating loss occurred in its taxable year ended April 30, 1973. No claim for refund would have been timely if it were filed after July 15, 1976. Petitioner did not file a claim for refund before this date. Moreover, the letter received by the Internal Revenue Service on June 2, 1977, which it treated as an informal claim for refund, was untimely under Section 6511(d)(2). The district court therefore lacked jurisdiction over petitioner's suit.

Petitioner argues (Pet. 4-5) that its application for a tentative carryback adjustment should be considered as an informal claim for refund, satisfying the jurisdictional requirement of Section 7422, and that, in any event, the government should not be permitted to raise the jurisdic-

tional defense because the Internal Revenue Service failed to act on petitioner's application within the time prescribed by statute.

But an application for a tentative carryback adjustment is not, and cannot be treated as, a claim for refund. Indeed, the statute authorizing the application expressly prohibits such treatment. It explicitly provides that: "An application under this subsection shall not constitute a claim for credit or refund" (26 U.S.C. 6411(a)).

The tentative carryback adjustment provided by Section 6411 is a summary procedure designed to afford a taxpayer a speedy refund during a potentially critical financial period, namely, immediately after it has undergone a loss year. *Schrader* v. *IRS*, 35 A.F.T.R. 2d 686, 687 (W.D. Ky. 1975); H.R. Rep. No. 849, 79th Cong., 1st Sess. 21 (1945). Accordingly, if a Form 1139 is filed within 12 months of the close of such a year, the Internal Revenue Service is bound within 90 days to pay the amount shown due, subject only to correction of mathematical errors. Section 6411(b); Treasury Regulations on Income Tax, Section 1.6411-2(b) (26 C.F.R.). If it subsequently determines that the refund was improper to any extent, the Service may then determine the appropriate deficiency. Section 6213.

Thus, the nature and function of a Section 6411 application are very different from that of a Section 6511 claim for refund, reflecting important differences in how the forms are treated by the Internal Revenue Service and in their impact on dealings between the government and the taxpayer. *Crismon* v. *United States*, 550 F. 2d 1205, 1206 (9th Cir.), cert. denied, 434 U.S. 807 (1977); *Morse* v. *United States*, 46 A.F.T.R. 2d, para. 80-5030 (Ct. Cl. (June 6, 1980)). An application under Section 6411 presumably will receive only a cursory examination for computational errors, and any actions on it is never final.

Hence, Treasury Regulations on Income Tax, Section 1.6411-1(b)(2) expressly warns, echoing the statute, that an application is not a claim for refund for purposes of Section 6511, and advises taxpayers that they may file a claim for refund before, simultaneously with, or after filing an application under Section 6411.

Moreover, a failure to respond to a taxpayer's application under Section 6411 cannot prevent the government from raising a jurisdictional defense under Section 7422. If it could, the Internal Revenue Service would have the authority to confer jurisdiction on the courts in cases where Congress refused to confer such jurisdiction. See *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535 (1938); *Bull* v. *United States*, 295 U.S. 247, 260-261 (1935). Although Section 6411 states that the Secretary of Treasury or his delegate *shall* make a limited examination of the application for computational errors and *shall* credit or refund the amount applied for within 90 days from the date when the application was filed, it provides no sanctions for the failure of the Secretary or of his delegate to perform those acts within 90 days. See *Zarnow* v. *Commissioner*, 48 T.C. 213 (1967). There is accordingly no statutory authorization to punish the government for lapses under Section 6411 as an informal claim under Section 6511.

Finally, the factual circumstances of this case do not in any event warrant affording petitioner any relief. Petitioner permitted 44 months to elapse before making any inquiries about an application that, in the normal course of events and as petitioner claims it expected, would be acted on within 90 days of its filing date. Petitioner could have filed an effective claim for refund at any time during the first 33 of these 44 months. The Internal Revenue Service did not lull petitioner into failing to file a refund claim. Its present predicament results from its own negligent failure to act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980

DOJ-1980-12